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IN THE

Supreme Court of the United States

October Term, 1958

No. 173

AUBREY LEE LITTLE, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston

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PETITION FOR WRIT OF CERTIORARI To the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston

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To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari, to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston in the above case. In this behalf, Petitioner shows unto the Court:

Opinion of the Court Below

There is no official report of the opinion of the Courts below, but the opinion of the Court of Civil Appeals

reversing the judgment of the Trial Court and remanding same, with instructions to the District Court of Harris County to transfer this cause to the District Court of McLennan County, Texas, appears at 319 S.W. 2d 785 (Appendix A) (R. 1). There was no written opinion by the Trial Court, but the judgment of the Trial Court appears in Appendix F (Tr. 28).

Statement Of Grounds On Which Jurisdiction Of This Court Is Invoked

The jurisdiction of this Honorable Court is based upon the Act of Congress of June 25, 1958, c. 646, 62 Stat. 929, Title 28, U. S. Code, Sec. 1257(3) providing that this Court may, by writ of certiorari, review any final judgment or decree rendered by the highest Court of the State in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution treaties or statutes of, or commission held or authority exercised under, the United States.

Judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, sought to be reviewed, was entered on the 18th day of December, 1958 (R. 2) and is set out in Appendix B.

Thereafter, on the 31st day of December, 1958, Petitioner filed a Motion for Rehearing in the Court of Civil Appeals. On January 8, 1959, the Court of Civil Appeals overruled Petitioner's Motion for Rehearing (Appendix C) (R. 3). Petitioner then filed a Petition for Writ of Error in the Supreme Court of Texas on February 12, 1959. Thereafter, on April 1, 1959, the Supreme Court of Texas dismissed the Petition for Writ of Error for want of jurisdiction. On April 10, 1959, Petitioner's

Motion for Rehearing was filed in the Supreme Court. On April 22, 1959, the Supreme Court of Texas overruled Petitioner's Motion for Rehearing. The Order overruling the Application and Motion for Rehearing are contained in Appendices D and E, respectively (R. 14, 15).

It is claimed that the decision of the State Court under the Federal Employers' Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45 U. S. Code, Secs. 51-60, and in particular Sec. 6 of the Federal Employers' Liability Act (45 U. S. Code, Sec. 56) is (a) not in accord with the applicable decisions of this Honorable Court; (b) conflicts with the latest decision by this Honorable Court where Sec. 6 of the Act was construed: *Pope v. Atlantic Coast Line R. Co.* (1953), 345 U.S. 379, 73 S. Ct. 749; (c) permits a state venue statute (which is not jurisdictional) to control venue in this suit, which state venue statute, in effect, deprives Petitioner of his substantial right to choose the forum in which to bring his suit and maintain his suit in a Texas State Court, contrary to multiple decisions by this Honorable Court that (1) the federal law is the supreme law of the land binding on a State Court under Art. VI, Sec. 2, U. S. Constitution (2) no substantive right of any party to a F.E.L.A. suit may be impaired by any local statute, rule or decision, or forms of local practice, (3) no peculiarity of state procedure will be permitted to enlarge or to abridge a substantive Federal right, and (d) permits a state venue statute, to control, which in effect *delimits the available forum in a Texas State Court suit* to (1) plaintiff's residence, or (2) place where injury occurred, *despite the fact that Congress refused to enact a proposed amendment* (Jennings Bill) *to Sec. 6 of the Act which would have likewise*

delimited the available forum, such proposed amendment contained provisions in substantially the same language as found in the Texas venue laws.

Questions Presented

Where Petitioner, a resident of McLENNAN COUNTY, TEXAS, brought suit to recover damages against Respondent carrier under the Federal Safety Appliance Act and the Federal Employers' Liability Act by reason of injuries sustained by him in an accident occurring in McLENNAN COUNTY, TEXAS, while Petitioner was working in the course of his employment as a car inspector, in the 80th JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS, where Respondent was admittedly doing business and operating a line of railway in and from the City of Houston, HARRIS COUNTY, TEXAS, the questions presented for Review are:

A. Whether Petitioner-employee was entitled to *bring and maintain* the suit brought by him in a State Court of competent jurisdiction where Respondent was admittedly doing business under Sec. 6 of the F.E.L.A., so that such federal law was controlling rather than a non-jursdictional Texas Venue Law (Sec. 25 of Art. 1995, V.A.T.S.) which delimits the available venue in a suit brought for personal injuries against a railroad company in a Texas State Court to the county (1) where plaintiff resided at time of injury, or (2) in which the injury occurred?

B. Whether the decision of the State Court, which gave controlling effect to a non-jurisdictional Texas Venue Law (Sec. 25, V.A.T.S.) is in conflict with decisions of

this Honorable Court wherein Sec. 6 of the F.E.L.A. has been construed, as well as decisions by this Honorable Court that the federal law is the Supreme Law of the Land (U. S. Constitution, Art. VI, Sec. 2), and substantial rights of a party created under the F.E.L.A., may not be impaired by any local statute, rule or decision, or forms of local practice.

C. Whether Petitioner, a resident of Texas, has a right under Sec. 6 of the Liability Act to maintain his suit in the State Court for trial where same was originally filed under Sec. 6 of the Liability Act in a county where Respondent is admittedly doing business where (1) Congress refused to amend Sec. 6 of the Liability Act to *delimit* the available forum to (a) place of injury, or (b) place of plaintiff's residence, where a Texas State District Court has *no power* to (a) decline jurisdiction, (b) transfer a case to a "more convenient forum" either under the doctrine of *forum non conveniens* or any statute of that sort? Can a non-jurisdictional Texas Venue Law (Sec. 25 of Art. 1995, V.A.T.S.) control in this case rather than Sec. 6 of the Liability Act when the provisions of said Sec. 25 are in substantially the same language of a proposed amendment to Sec. 6 of the Liability Act which Congress refused to enact?

Statutes Involved

The statutes involved are:

28 U. S. Code, Sec. 1257(3) (Appendix G).

45 U. S. Code, Sec. 51 (Appendix H).

45 U. S. Code, Sec. 56 (Appendix I).

Article 1995, Sec. 25, Vernon's Annotated Texas Statutes, (Appendix J). (V.A.T.S.)

Article 1995, Sec. 30, Vernon's Annotated Texas Statutes, (Appendix J). (V.A.T.S.)

Concise Statement of the Material Facts

Petitioner brought suit in the *80th Judicial District Court of Harris County, Texas* against Respondent carrier to recover damages in the sum of $25,000.00 under the Federal Safety Appliance Act (45 U. S. Code, Sec. 1 et seq.), and the Federal Employers' Liability Act (45 U. S. Code, Sec. 51, et seq.), for bodily injuries sustained by him while working in the course of his employment for Respondent in the Yards of Respondent in the Town of Mart, McLENNAN COUNTY, TEXAS. (Tr. 1-6).

Petitioner was a *resident of McLennan County, Texas* at the time of the occurrence made the basis of this suit and at the time of the institution of the suit. (Tr. 27). Respondent carrier was a foreign (Missouri) corporation. At all times material to this suit, *Respondent had an office and place of business in the City of Houston,* HARRIS COUNTY, TEXAS, *and was operating a line of railway in and from* HARRIS COUNTY, TEXAS. (Tr. 25-26).

Respondent filed a Plea of Privilege and, subject to said Plea, its Answer in the said DISTRICT COURT OF HARRIS COUNTY, TEXAS. As a basis of said Plea, Respondent alleged venue of this suit was governed by Sec. 25 of Article 1995, V.A.T.S. (Appendix J) and prayed for transfer of this suit from the 80th JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

to the DISTRICT COURT OF McLENNAN COUNTY, TEXAS. (Tr. 6-7). Petitioner seasonably filed his Controverting Affidavit to said Plea alleging venue was properly laid in the DISTRICT COURT OF HARRIS COUNTY, TEXAS, *where Respondent carrier was doing business and operating a line of railway in and from Harris County, Texas,* under Sec. 6 of the F.E.L.A. (45 U. S. Code, Sec. 56, Appendix I), or in the alternative, under Sec. 30 of Article 1995, V.A.T.S. (Appendix J). (Tr. 10-16).

At the hearing in the District Court of Harris County, Texas, on Respondent's Plea of Privilege and Petitioner's Controverting Affidavit, the only evidence adduced was based on a Stipulation of Facts (Tr. 25-28), which incorporates therein Respondent's Reply to Admission of Relevant Facts (Tr. 22-24). Briefly, this Stipulation of Fact set out therein (a) Petitioner *resided in McLennan County, Texas where the accident* made the basis of this suit *occurred;* (b) Petitioner and Respondent were engaged in interstate commerce and the *cause of action arose under* and *was governed by the Federal Safety Appliance Act and the Federal Employers' Liability Act;* (c) Petitioner was in the discharge of the duties of his employment as car inspector on December 2, 1956 when he sustained the injuries made the basis of this suit; (d) *Respondent was a railroad corporation, organized under the laws of Missouri with an office and place of business in the City of Houston, Harris County, Texas, and was operating a line of railway in and from Harris County, Texas at all times material to this suit* (county where suit was brought).

Based on this Stipulation of Facts, the District Judge of the 80th Judicial District Court of Harris County,

Texas, sustained the contentions advanced by Petitioner in his Controverting Affidavit to the Plea of Privilege and entered an Order overruling Respondent's Plea of Privilege, and *venue of this cause was fixed and retained in Harris County, Texas, the County in which said suit was originally filed.* (Appendix F, Tr. 29).

On appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, the judgment of the District Court was reversed, and the cause was *remanded* to the Court below with instructions to *transfer* this cause to the *District Court of McLennan County, Texas.* (Appendix B, R. 2).

The following quotation from the Opinion of the Court of Civil Appeals (319 S.W. 2d 785, Appendix A, R. 1), clearly demonstrates that a federal question was raised:

> "Appellee (Petitioner) concedes that if venue of this suit is governed by Sub-division 25 of Article 1995, V.A.T.S., it should be transferred to the District Court of McLennan County, Texas * * *." (319 S.W. 2d 786) (Appendix A, p. 32).
>
> "We need not discuss further the decisions of the Texas Courts holding that Sub-division is mandatory, especially since Appellee (Petitioner) concedes that the case would have to be transferred in the event venue is not controlled by Section 56 of Title 45, U.S.C.A., * * *." (319 S.W. 2d 787) (Appendix A, p. 33).
>
> "Since Appellee is asserting a right under the Federal law, it is our duty to protect him, as Congress intended him to be, * * *." (319 S.W. 2d 788 (Appendix A, p. 36).

The State Court then proceeded to render judgment *depriving* Petitioner of his *federally created rights which Congress intended for Petitioner to have.*

While Petitioner did not concede Sec. 30 of Article 1995, *V.A.T.S.* was *not* applicable in this cause, it is here noted the provisions of said section are intertwined with a construction of Sec. 56 of Title 45, U. S. Code. (Appendix I and J).

In effect, the Court of Civil Appeals sustained the contention of Respondent that the *State Venue Law controlled*, and *overruled* Petitioner's contention that *venue* of this cause of action *was governed by the Federal Law* (Sec. 6 of F.E.L.A., 45 U. S. Code, Sec. 56), or in the alternative, Sec. 30 of Article 1995, V.A.T.S.

Petitioner contended: (a) Sec. 6 of said Liability Act gave him a substantial right to bring suit in a State Court where Respondent was doing business. (b) the *venue* was *not* limited to bringing and maintaining this action in (a) the county of his residence, or (b) place where the injury occurred as required under Sec. 25 of Article 1995, V.A.T.S. (State Venue Law). Nevertheless, the judgment of the Court of Civil Appeals instructed the Trial Court to transfer this suit to the District Court of McLennan County, Texas, thus giving effect to the mandatory provision of Sec. 25 of Article 1995, V.A.T.S., rather than Sec. 6 of the F.E.L.A. and the corollary right to bring suit in the Court where jurisdiction was prescribed under the law creating the right as provided for under Sec. 30 of Article 1995, V.A.T.S.

Petitioner seasonably filed his Motion for Rehearing, strenuously urging the Court of Civil Appeals to set aside

its judgment, and affirm the judgment of the District Court of Harris County, Texas, on the same grounds now being urged in this Honorable Court. The Court of Civil Appeals overruled said Motion. (Appendix C, R. 3). Thereafter, Petitioner filed his Application for Writ of Error in the Supreme Court of Texas. Despite the fact Petitioner again urged the contentions here advanced, fortified by the construction of Sec. 6 of the F.E.L.A. by this Honorable Court, the Supreme Court of Texas dismissed the Application for want of jurisdiction. (Appendix D, R. 14). Subsequently, Petitioner's Motion for Rehearing was overruled by the Supreme Court of Texas. (Appendix E, R. 15).

Reasons For Granting The Writ

1. *The State Court by its decision and judgment in this cause denied Petitioner a right specially set up and claimed by him under the F.E.L.A., and in so doing reached this result by construing Sec. 6 of the F.E.L.A., contrary to the meaning of said Section by controlling decisions by this Honorable Court in the following cases: Pope v. Atlantic Coast Line R. Co. (1953), 345 U.S. 379, 73 S. Ct. 749; Miles v. Illinois Central Railroad Co. (1942), 315 U.S. 698, 62 S. Ct. 827, 86 L. Ed. 1129; Baltimore & O. R. Co. v. Kepner (1941), 314 U.S. 44, 62 S. Ct. 6, 86 L. Ed. 28 (Second Employers' Liability Act Case), Mondou v. New York, N. H. & H. R. Co. (1911), 233 U.S. 1, 32 S. Ct. 169, 56 L. Ed. 327; and as a consequence the State Court's decision is in conflict with these controlling decisions and violates the principle of uniformity in the construction of the F.E.L.A., heretofore demanded by this Honorable Court.*

The rights asserted by Petitioner in this cause were Federal rights given him by Federal Statute. Sec. 6 of the Federal Employers' Liability Act gave Petitioner a transitory cause of action and establishes Petitioner's right to sue in a State Court wherever the carrier "shall be doing business" (Appendix I). *Pope v. Atlantic Coast Line R. Co.* (1953), 345 U.S. 379, 73 S. Ct. 749. The right to select the forum in which to bring and maintain his suit is a substantial right which was granted in said Sec. 6. *Boyd v. Grand Trunk Western R. Co.* (1949), 338 U.S. 263, 70 S. Ct. 26, 94 L. Ed. 55. Despite the fact it is a well established principle as announced and decided by this Honorable Court that in a suit brought under the Federal Employers' Liability Act *that no substantive right of any party to such suit may be impaired by any local statute, rule or decision, or forms of local practice*, the State Court deprived Petitioner of his Federal rights given him under the Federal Employers' Liability Act by giving controlling effect to Sec. 25 of Article 1995, *Vernon's Annotated Texas Statutes*, which is one of the sections or sub-divisions of the State Venue Law. (Appendix J). That part of the State Law pertinent to a consideration of the question here reads as follows:

> "25. Railway personal injuries.—Suits against railroad corporations * * * operating any railway in this State, for damages arising from personal injuries * * * shall be brought either in the *county* in which the *injury occurred*, or in the *county* in which the *plaintiff resided* at the time of the injury. * * *." (Emphasis supplied).

In reversing the judgment of the Trial Court and remanding this cause with instructions to *transfer* this cause to the

DISTRICT COURT OF McLENNAN COUNTY, TEXAS the State Court did not follow the applicable decisions and construction of the Liability Act as will be discussed herein. At this point, however, the attention of this Honorable Court is called to the Jennings Bill (H.R. 1639) which was a proposed amendment to Sec. 6 of the Federal Employers' Liability Act, but which *Congress refused to enact* discussed by this Honorable Court in *Pope v. Atlantic Coast Line Railway Co.*, 345 U.S. 379, 73 S. Ct., 749. In that case, this Honorable Court called attention to the fact that Congress refused to enact this Bill which would have amended Sec. 6 of the Federal Employers' Liability Act by limiting the employees' choice of venue (a) to the place of his injury; or (b) to the place of his residence. It will thus be noted that Congress refused to enact a bill limiting the choice of venue to the very places contained in the Texas Venue Law. Despite the fact Congress refused to limit the choice of forum, the State Court has done just that in the case at bar by giving controlling effect to Sec. 25 of Art. 1995, V.A.T.S.

Under the Texas law, *venue* signifies the county in which the plaintiff has the *legal right to institute and maintain his suit, notwithstanding the defendant's objection. Jurisdiction* means the power conferred upon a Court by the Constitution and laws to maintain the merits of that suit as between the parties and to carry its judgment into effect. *National Life Co. v. Rice* (1943) 140 Tex. 315, 167 S.W. 2d 1021. The *jurisdiction* of the *District Court of Harris County, Texas* where Petitioner brought this suit is *not* involved in this litigation because under Article 5, Section 8, of the Constitution of Texas and Article 1906, V.A.T.S. (Appendix L), *every District Court in Texas*

has jurisdiction over the subject matter of this suit because the suit involved a controversy where the amount involved is more than $500.00, exclusive of interest.

A District Court has no authority under the law of Texas *to decline to try a case. H. Rouw Co. v. Railway Express Agency* (El Paso CCA 1941), 154 S.W. 2d 143, writ of error refused; *Allen v. Bass* (El Paso CCA 1932) 47 S.W. 2d 426, writ of error refused ("writ of error refused" means that the Supreme Court of Texas adopts the opinion of the Court of Civil Appeals as its opinion). Texas does *not have* the doctrine of *forum non conveniens*, which was recognized by the opinion of the State Court in the case at bar. The *Plea of Privilege*, upon which Respondent relied for a transfer of this Cause to the DISTRICT COURT OF McLENNAN COUNTY, TEXAS, *is a creature of the Texas Law enacted for the benefit of defendant. Fouse, et ux v. Gulf, C. & S. F. Railway Co.*, (Ft. Worth CCA 1946), 193 S.W. 2d 241. (This case did not involve the F.E.L.A.). The court there noted that a transfer which defendant contended for in that case was a "valuable right that the law (Texas) vouchsafed to him." The dominant purpose of Texas venue statute is to give a person who has been sued to *defend* such suit in the place of his residence. *A. H. Belo Corp. v. Blanton* (1939) 133 Tex. 391, 129 S.W. 2d 619. With the exception of that part of the Texas venue statutes which are mandatory, ordinarily a Plea of Privilege is a plea on a part of a defendant to transfer the case to the place of his residence. The Plea of Privilege is *prima facie evidence* that the cause will be *transferred* to the place named by the defendant in the Plea unless plaintiff files a Controverting Affidavit alleging and proving there are legal reasons or exceptions

of maintaining venue in the court in the county where suit was brought. A Texas Court can *only* transfer a civil case under laws passed by the Legislature providing for the manner of making such change under Article 3, Section 45 of the Constitution of Texas, which reads as follows:

> "The power to change the venue in civil and criminal cases shall be vested in the courts to be exercised in such manner as shall be provided by law; and the Legislature shall pass laws for that purpose." (Vol. 1, Vernon's Texas Constitution, Art. 3, Sec. 45).

In the case at bar, Respondent filed a Plea of Privilege alleging it was entitled to a transfer of this cause to McLennan County on the ground that (a) Petitioner resided in that county; and (b) the injury occurred in that county, under Section 25 of Article 1995, V.A.T.S. Petitioner *controverted* same by filing his Controverting Affidavit on the basis that venue and his rights were controlled by Federal law, under 45 U. S. Code, Sec. 56 (Sec. 6 of the Federal Employers' Liability Act), or, in the alternative, Sec. 30 of Article 1995, Vernon's Annotated Texas Statutes (Appendix J). The Trial Court sustained the contentions of Petitioner and entered its Order fixing *venue* under of this cause in Harris County, Texas, the county in which suit was originally filed.

The Court of Civil Appeals for the First Supreme Judicial District of Texas reversed and remanded the cause to the Trial Court with instructions that the Court *transfer* this cause to the DISTRICT COURT OF McLENNAN COUNTY, TEXAS, on the ground that Section 25 of Article 1995, V.A.T.S., controlled, rather than Sec. 6 of

the Liability Act, and as to the alternate ground of Petitioner, stated that apparently that ground had been abandoned, that is, the one based on Sec. 30 of Article 1995. There had been *no abandonment* of that claim in that Court, but the construction of same was intertwined with the meaning of the Federal Employers' Liability Act and, in particular, Sec. 6 of that Act. The fact that the State Court gave effect to a mandatory provision of the State Venue Law does and did not and could not change the fact that the *venue* question did not include the question of *jurisdiction*. It is well settled by the law of Texas that a mandatory provision of the Act relates to *venue or privilege* and is *not jurisdictional*. *Sunstill u. Scott* (1942) 138 Tex. 425, 160 S.W. 2d 65, 69; *South Texas Development Co. et al v. Williams*, 130 Tex. 217, 107 S.W. 2d 378, 379; *DeLa Vega v. League*, 64 Tex. 205, 214; *Lewis v. Gulf, Colorado & Santa Fe Railway Co.* (Galveston CCA 1952), 229 S.W. 2d 395, 398, writ dismissed.

In the foregoing background of the meaning and distinction between "Venue" and "Jurisdiction" under the law of Texas, a Texas Court has *no power* to transfer except under a *state statute*, and doctrine of *forum non conveniens* does *not* apply in Texas, all of which is admitted in the course of the opinion of the State Court in the following language:

> "Since we do not have the doctrine of forum non conveniens in Texas and Sec. 1404 of Title 28, U.S.C.A., does not apply to state courts, *our courts may not transfer causes of action except in compliance with statutory provisions governing venue of causes of action in this State.* We think it probable that *had not Congress understood that these cases*

would be governed by State Venue Statutes, Sec. 1404 would have been so written as to include suits filed in state courts. (Emphasis supplied). (319 S.W. 2d 789)

"' * * ' * We think this language clearly supports our holding that *venue*, as distinguished from jurisdiction, is established by state enactment and is subject to state law. Note that the right given to sue is to sue in state courts of proper venue where their jurisdiction is adequate. Further, the implication is certain that states can control their own courts."[1] (319 S.W. 2d 790) (Appendix A).

In holding that the state law controlled rather than the federal, the State Court committed error, and a Writ of Certiorari should be granted. The conclusions expressed by the State Court are *not* supported, and are in conflict with decisions by this Honorable Court.

In discussing Sec. 6 of F.E.L.A. in relation to a suit brought in the State Court of Alabama, in the case of *Pope v. Atlantic Coast Line R. Co.*, (1953) 345 U.S. 379, 73 S. Ct. 749, which appears to be the latest case in which that Section has been construed by this Honorable Court, Mr. Chief Justice Vinson said:

"Jurisdiction and *venue* were grounded on Sec. 6 of the Act." (73 S. Ct. 750)

"Sec. 6 of that Act establishes Petitioner's right to sue in Alabama. It provides that the employee, may

[1] Compare **Mondou v. New York, N.H. & H.R. Co.** (1911) 233 U.S. 1, 32 S.Ct. 169, 56 L.Ed. 327, where the test under the F.E.L.A. was not venue but **"JURISDICTION"** expressed in the following language 'when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion'—POINTING OUT the Connecticut State Court was one of general jurisdiction.

bring his suit wherever the carriers 'shall be doing business', and admittedly respondent does business in Jefferson County, Alabama. Congress has deliberately chosen to give petitioner a transitory cause of action; * * *" (73 S. Ct. 751).

In the Dissenting Opinion, Mr. Justice Frankfurter said:

"The doctrine enunciated by Kepner and Miles at least made for *uniformity in the operation of Sec. 6*, in that those cases treated the grant of authority to State and federal courts to entertain Federal Employers' Liability actions as the grant of an unqualified right to plaintiffs, indefeasible regardless of the interests of justice affected in its exercise * * *". (Emphasis supplied) (73 S. Ct. 756)

"The Court found in those two cases (*Baltimore & O.R. Co. v. Kepner*, 314 U.S. 44, 62 S. Ct. 6, 86 L. Ed. 28, and *Miles v. Illinois Central R. Co.*, 315 U.S. 698, 62 S. Ct. 827, 86 L. Ed. 1129) that Congress by Sec. 6 of the Federal Employers' Liability Act, had given *plaintiffs unrestrainable freedom in a choice of a forum among the Courts—State and Federal—which were authorized to entertain actions under the Act.* * * *". (73 S. Ct. 754) (Emphasis supplied).

"Only if he brings his action in a court of one of these States[2] *can a plaintiff be sure, under today's decision, that no matter how unjustifiable his choice, the forum in which the action is brought will be the forum in which it is tried."* (Emphasis supplied) (73 S. Ct. 756).

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[2] A State which has not adopted the doctrine of **forum non conveniens**. (Texas is a State which does not have such doctrine)

Bearing in mind that the Texas venue law provides that suit must be brought against a railroad corporation for personal injuries in the county where (a) the injury occurred; or (b) where the plaintiff resided at the time of injury (Petitioner was a resident of Texas), let us see what this Honorable Court said about the enactment of 28 U. S. Code, Sec. 1404(a) and Sec. 6 of the Liability Act, which was considered by the same Congress, in the *Pope* case,[3] supra:

> "Congress might have gone further; it might have vested state courts with the power asserted here. *In fact, the same Congress which enacted Sec. 1404(a) refused to enact a bill which would have amended Section 6 of the Federal Employers' Liability Act by limiting the employee's choice of venue to the place of his injury or to the place of his residence.*
>
> *"This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the Miles and the Kepner cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the Miles and Kepner decisions, injured employees were left free to abuse their venue rights under Section 6 and 'harass' their employers in distant forums without restrictions. They insisted that these abuses be curtailed. These arguments prevailed in the House which passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and Section 6 of the Federal Employers' Liability Act was left just as this Court had construed it."* (Emphasis supplied) (73 S. Ct. 753).

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[3] 315 U. S. 379, 73 S.Ct. 749.

How did this Honorable Court construe Sec. 6 of the Act in the *Miles* case, supra.[4] Mr. Justice Jackson said:

> "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and *in which to choose either a federal or a state court of which to ask his remedy.*" (Emphasis supplied) (62 S. Ct. 832).

At 62 S. Ct. 829, Mr. Justice Reed said:

> "The specific declaration in section 6 that the United States courts should have concurrent jurisdiction with those of the several states and the prohibition against removal point clearly to the *conclusion that Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts*, despite the incidental burden, where process may be obtained on a defendant, not merely soliciting business *but actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the courts' jurisdiction.*" (Emphasis supplied).

Does the above language suggest that a *resident Texas plaintiff-employee* is compelled to bring suit in a Texas State Court in accordance to the non-jurisdictional "mandatory" requirement of the State Venue Law rather than exercising *his federal right to bring suit in a State Court of competent jurisdiction where Respondent was admittedly doing business?* If he is so compelled, then in a Texas State Court, *Petitioner*, AS WELL AS ALL LIABILITY ACT

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[4] **Miles v. Illinois Central Railroad Co.** (1942) 315 U.S. 698, 62 S.Ct. 827, 86 L.Ed. 1129.

PLAINTIFFS, are automatically cut off from a *substantial* right afforded them under the Act to select the forum because the dominant purpose of the Texas Venue Law is the *privilege* of a defendant. Yet, this Honorable Court said in *Boyd v. Grand Trunk Western R. Co.*, (1949), 338 U.S. 263, 70 S. Ct. 26, 28, 94 L. Ed. 55,—"The right to select the forum granted in Section 6 is a substantial right * * *".

In *Missouri Ex Rel, St. Louis, Brownsville & Mexico Railway Company v. Taylor*, (1924) 266 U.S. 200, 45 S. Ct. 47, 69 L. Ed. 247, the Supreme Court of the United States said:

> "The grant of concurrent jurisdiction implies that, in the first instance, the plaintiff shall have the choice of the Court * * *".

It seems clear from the above construction of Sec. 6 by this Honorable Court "concurrent jurisdiction" is the key, which gives a Liability Act plaintiff the right to pursue his remedy in a State Court where the carrier "shall be doing business", rather than having such federally created right emasculated by the State Venue Law of the several states, each of which could have an entirely different venue provision, so there could be no *uniformity* in the construction of said Sec. 6. Concurrent jurisdiction is so defined at 21 C.J.S., Sec. 18, Page 34—"jurisdiction exercised by different courts at the same time over the same subject matter and *within the same territory*, and wherein litigants may in the *first instance resort to either court* indifferently * * *". In other words, where Respondent was admittedly doing business in *Harris County*, Petitioner had the right created by federal law to bring and maintain his suit either in the *State Court of Harris County, Texas*, or *in*

the Federal District Court at Houston. His federal right could not thus be defeated by a mandatory provision of the State Venue Law.

SECOND EMPLOYERS' LIABILITY CASES *(Mondou v. New York N. H. & H.R. Co.* (1911), 233 U.S. 1, 32 S. Ct. 169, 56 L. Ed. 327 stands for the principle that the Act required *uniform interpretation.* Moreover, this Honorable Court explained what it meant by "when its ordinary jurisdiction, as prescribed by local law, is appropriate to the occasion." It was tested on the basis the Connecticut State Court was, under the law of Connecticut, a Court of *general jurisdiction*, empowered to take cognizance of actions to recover for personal injuries and death, and accustomed to exercise that *jurisdiction.*

In speaking of the Supremacy of the federal law, it was there said:

> *"The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress in the exertion of the powers confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and therefore established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the Courts of the state."* * * *." (56 L. Ed. 349) (Emphasis supplied)

Thus, it is seen Sec. 6 of said Liability Act speaks to the State Courts the same as if the Act had emanated from the Texas legislation—permission to bring suit in a State

Court where the carrier is doing business. On what basis could the Texas legislature deprive a plaintiff-employee of this right by a mandatory provision of a Texas Venue Law, which is *not jurisdictional*, without doing violence to the Supremacy Clause of the U. S. Constitution? While in this case Petitioner is a resident of Texas and the accident occurred in Texas, this Honorable Court held unconstitutional *State Statutes* which barred non-residents from bringing suit occurring in another state on the basis such state statutes violated the Full Faith and Credit Clause of the Constitution. *First National Bank of Chicago v. United Air Lines, Inc.*, (1952), 72 S. Ct. 421, 342 U.S. 396; *Hughes v. Fetter*, 341 U.S. 609, 71 S. Ct. 980, 95 L. Ed. 1212. In the latter case, it was there stated the statute could not be considered an application of the doctrine of *forum non conveniens.*

How could the decision of the State Court be correct in the case at bar when its opinion shows plainly it relied heavily on the *Missouri* case.* There the question presented was whether the State Court was free to decide the availability of the principle of *forum non conveniens* according to its own local law—a jurisdictional question—but Texas does not have that doctrine. Surely a State Venue Law such as Texas has in suits involving personal injuries against a railroad company could not become the Supreme Law or be considered an application of a doctrine, which, in law, does not prevail in Texas any more than Wisconsin could adopt a statute prohibiting suits of non-residents discussed in the *Hughes* case, supra, without doing violence to the aforementioned provisions of the U. S. Constitution.

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* Missouri ex rel v. Mayfield (1950) 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3.

In the case of *Baltimore & O. R. Co. v. Kepner*, (1941), 314 U.S. 44, 62 S. Ct. 6, 86 L. Ed. 28, it is made perfectly clear that rights established under Sec. 6 must be considered by a State Court on the basis that it is the Supreme Law. While the matter there under consideration pertained to the venue in a Federal Court, the Court there said at 62 S. Ct. Page 9:

> "* * * *Its correct decision depends upon a construction of a federal act. Consequently the action of a state court must be in accord with the federal statute and the federal rule as to its application rather than state statute, rule or policy.*" (Emphasis supplied).

The Supreme Court further pointed out in its opinion that no state statute could vary the venue. (62 S. Ct. p. 10).

The State Court's opinion, decision and judgment are not in accord with the construction of said Sec. 6 of this Honorable Court; therefore, a Writ should be granted to accord Petitioner his right to maintain his suit in the State Court where suit was brought and where Respondent is admittedly doing business. If the State Court judgment is permitted to stand, such decision would be in *conflict* with the decisions by this Honorable Court; it violates the well established principle that the Federal law is the Supreme Law of the Land, as well as a multitude of cases decided by this Honorable Court holding that there should be *uniformity* in the construction of the Federal Employers' Liability Act. *It is a grave and important matter to all Liability Act plaintiffs in the State of Texas—to preserve their federally created right*, which is a *substantive right*, in choosing the forum to *bring and maintain same* in such forum for a trial of the cause

2. The State Court by its decision and judgment in this Cause denied Petitioner a right springing from the Federal law specifically set up and claimed by him under the F.E.L.A., the right to choose the forum in a State Court of competent jurisdiction where Respondent was admittedly doing business, and under the circumstances of this Cause, maintain his suit in that forum, which Federal right could not be defeated by a mandatory provision of a State Venue Law, which was not "jurisdictional," to-wit: Section 25 of Article 1995, V.A.T.S. The mandatory provisions are those which Congress refused to enact—in view of this irreconcilable conflict, the State statute yields to the controlling Federal statute under the Supremacy Clause of the U. S. Constitution (Art. IV, Sec. 2), so that Sec. 6 of the Liability Act controls the disposition of this cause.

The State Court judgment appears to rest on the basis that once having selected the State Court as the forum, Petitioner has exercised his right and, thereafter, could not maintain suit in the forum selected because Sec. 25 of Article 1995, V.A.T.S., comes into effect.

The law never requires a party to do a useless thing. How can a Liability Act plaintiff preserve his substantial right to choose a Texas State Court under Sec. 6 of the Liability Act, if immediately thereafter, a *carrier* files a Plea of Privilege, which, as a matter of Texas law, would immediately prevail at the behest of the carrier under the mandatory requirement of Sec. 25 of Article 1995, which *delimits* the *available forum in a Texas State Court to the place of residence or place of injury*? Why exercise his federal right if a State Venue Law immediately takes it away by transfer which would operate summarily upon the carrier filing a Plea of Privilege—without regard to the

Federal law—without regard to whether, in fact, the Court, where the suit was brought, was the most convenient.

The State Court says, in its opinion, that a State can "control its Courts". While Petitioner asserts the Texas Venue Law was designed for the *privilege* of a defendant, a State does not have such control of its Courts that such "control" *can defeat a substantial right under the* F.E.L.A. *Deen v. Hon. J. E. Hickman, Chief Justice, et al. of the Supreme Court of Texas*, ____ U. S. ____, 79 S. Ct. 1 (Advance Sheet, Nov. 15, 1958). Based on this mandamus proceeding in this Honorable Court, the Texas Supreme Court revoked its decision rendered May 7, 1958, 312 S.W. 2d 933, where the Texas Supreme Court contended such "control" could defeat a substantial right under the F.E.L.A. *Gulf Colorado & Santa Fe Railway Co. v. Deen* (1958); 317 S.W. 2d 913.[6]

The State Court judgment appears to rest on the basis that there is "no discrimination" in the operation of Sec. 25 between other suits brought against a *railway for personal injuries;* therefore, Sec. 25 of Article 1995, V.A.T.S., prevailed over the rights established under Sec. 6 of the Liability Act.

Had this personal injury suit been brought against any other foreign corporation than a railroad (Respondent was a foreign corporation), or had this suit been brought

[6] **Deen v. Gulf, Colorado & Santa Fe R. Co.** (1957) 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed. 2d 721 rev. Tex. Civ. App., 275 S.W. 2d 529, id. 306 S.W. 2d 171 id. rev. Tex. Sup. Ct. 312 S.W. 2d 933, MANDAMUS Proceeding Sust. issuance of WRIT, —U.S.—, 79 S.Ct. 1; REVOCATION of decision and opinion of May 7, 1958 (312 S.W. 2d 933) Tex. Sup. Ct. id. (1958) 317 S.W. 2d 913

against a railroad corporation for damages other than personal injuries, a plaintiff would have a right under the Texas law to maintain his suit in a Court where the defendant corporation had an agent under Secs. 27 and 23 of Article 1995, V.A.T.S., Appendix J. These statutes give permissive right in the plaintiff to maintain his suit where a defendant is doing business, as distinguished from the mandatory requirement of Sec. 25 involving a suit for personal injuries against a railway corporation. The discriminatory provisions in the Texas law does not give a state legislature the power to take away a federally created right—without doing violence to the federal law—the Supreme law.

Petitioner's rights were established under Sec. 6 of the Liability Act, which could not thereafter be taken away by contrary provisions of a Texas Venue Law.

While the State Court appears to have reached a conclusion Congress would have provided for power in a State Court to transfer under 28 U. S. Code, 1404(a) had it not thought that the State Venue Law controlled in this Liability Act case, it is respectfully submitted that at the time Congress considered this transfer statute for a Federal District Court, the *same Congress* had under consideration a proposed amendment to Sec. 6 of the Liability Act which would have *delimited venue and available forum* in which to bring a F.E.L.A. suit. Under these circumstances, it is hardly possible Congress was not fully aware of the construction of said Sec. 6 by this Honorable Court as establishing the right in a plaintiff-employee to file suit in a State Court where the Respondent carrier was doing business and to maintain same there under the Federal law, provided the *jurisdiction* of the State Court was adequate

to the occasion under local law. We are not concerned here with any Texas statute containing provisions similar to the federal transfer statute.

In numerous cases this Honorable Court has held *that no peculiarity of state procedure will be permitted to enlarge or to abridge a substantive federal right. Brown v. Western Railway of Alabama*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 100; *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 72 S. Ct. 312, 96 L. Ed. 398; *Garrett v. Moore-McCormack Co.* (1942), 317 U.S. 239, 63 S. Ct. 246, 87 L. Ed. 239. It is equally a well established principle as announced and decided by this Honorable Court in a suit brought under the Federal Employers' Liability Act that *no substantive right of any party to such suits may be impaired by any local statute, rule or decision, or forms of local practice. Baltimore & O. R. Co. v. Kepner* (1941), 314 U.S. 44, 62 S. Ct. 6, 86 L. Ed. 28; *Davis v. Wechsler*, 263 U.S. 22, 44 S. Ct. 13, 68 L. Ed. 143; *McAllister v. Magnolia Petroleum Company* (1958), 357 U.S. 221, 78 S. Ct. 1201. In the last cited case, this Honorable Court resolved a conflict between the Texas statute of limitation and the federal statute (Sec. 6 of the Liability Act) by holding the federal law controlled so as to preserve the cause of action for the seaman's claim of unseaworthiness. Sec. 6 of the Liability Act established the right of Petitioner to bring this suit in a State Court where Respondent was doing business which could not be taken away by State Venue Statute which, in effect, took away this federal right. To hold otherwise would make the state law paramount over the federal law, when the United States Constitution provides that the laws of the United States shall be the supreme law of the land.

Conclusion

It is respectfully submitted that the opinion and decision of the Court of Civil Appeals for the First Supreme Judicial District of Texas in this case is in conflict with the express provisions of the Federal Employers' Liability Act and controlling decisions of this Honorable Court construing that Act; the State Venue Law, and in particular Sec. 25 of Article 1995, Vernon's Annotated Texas Statutes, conflicts with Petitioner's rights found and established under Sec. 6 of the said Liability Act; that a Writ of Certiorari should be granted in order that this Honorable Court may review the record and the opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas, and finally reverse that judgment and render judgment in favor of Petitioner by affirming the judgment of the Trial Court, who overruled Respondent's Plea of Privilege and fixed and maintained venue in the county where the suit was originally brought, and Petitioner prays for such other and further relief, general and special, at law and in equity, to which he may show himself justly entitled.

Respectfully submitted,

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By _____
Member of the Bar of the Supreme Court of the United States

Of Counsel:

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Certificate of Service

I certify that a copy of the foregoing Petition for Writ of Certiorari has been mailed on the 27th day of June, 1959, to the Respondent's attorneys as follows: To Messrs. Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Building, Houston 2, Texas, and to Messrs. Arterbury, Hoover & Graham, successor firm to. Messrs. Woodul, Arterbury & Wren, and to Howard S. Hoover, Esq., and Carroll R. Graham, Esq., at their present address, 1529 Bank of the Southwest Building, Houston 2, Texas.

Albert P. Jones

ALBERT P. JONES

APPENDIX A

MISSOURI PACIFIC RAILROAD COMPANY, *Appellant*,

v.

AUBREY LEE LITTLE, *Appellee*

Appeal from 80th District Court of Harris County.

This is an appeal from an order of the 80th Judicial District Court of Harris County, Texas, overruling appellant's plea of privilege to remove the cause to McLennan County, Texas.

On the hearing of the plea, it was stipulated by the parties that on December 2, 1956, appellee, Aubrey Lee Little, while in the course of his employment for appellant, Missouri Pacific Railroad Company, a Missouri corporation, sustained personal injuries in the yards of appellant in McLennan County. At such time appellee was a resident citizen of McLennan County and his injury occurred while he and appellant were engaged in interstate commerce. It was further stipulated that the cause of action made the basis of this suit arose under and is governed by the Federal Safety Appliance Act and the Federal Employers' Liability Act, Title 45, U.S.C.A., Secs. 1-16, Secs. 51 et seq. The admissions made by appellant in reply to appellee's request for admissions of relevant facts are included as a part of the stipulation without being copied therein. We need not set out the admissions in full. It suffices to say that appellant admitted that it had an office and place of business in the City of Houston, Harris County, Texas, and was and is doing business in Harris County. It was further admitted that at such time appellant was a common carrier by railroad in the states of Texas and Missouri, and that it maintained yards in the town of Mart, McLennan County, Texas.

Appellant contends that the cause should be transferred on its plea of privilege to McLennan County since the

venue of the suit is governed by Subdivision 25 of Article 1995, Vernon's Annotated Texas Statutes, which reads as follows:

[2] "25. Railway personal injuries. - - Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a non-resident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office. As amended Acts 1947, 50th Leg., p. 104, ch. 71, § 1."

Appellee, on the other hand, contends that venue is controlled by Section 56 of Title 45, U.S.C.A., or, in the alternative by Sec. 30 of Article 1995, Vernon's Annotated Texas Statutes. He has, however, apparently abandoned his contention that Section 30 of Article 1995 has any material application in the determination of the question involved in this suit. Appellee concedes that if the venue of this suit is governed by Subdivision 25 of Article 1995, V.A.T.S., it should be transferred to the District Court of McLennan County.

In the case of Lewis vs. Gulf, Colorado & S. F. Ry. Co., 229 S.W. 2d 995, decided by this Court, writ dismissed, an

employee of Gulf, Colorado & S. F. Ry. Co. who was injured while working in the course and scope of his employment in Hardin County, Texas, the county of his residence, through which said railroad operated and did business, undertook to sue in Galveston County, Texas, on the ground that the principal office and place of business of the defendant was in that county. The Court held that Subdivision 25 of Article 1995, V.A.T.S., was mandatory, and that the suit had to be prosecuted in Hardin County.

We need not discuss further the decisions of the Texas courts holding that Subdivision 25 of Article 1995 is mandatory, especially since appellee concedes that the case would have to be transferred to McLennan County in the event venue is not controlled by Sec. 56 of Title 45, U.S. C.A., which reads as follows:

[3] "No action shall be maintained under this chapter unless commenced within three years from the date the cause of action accrued.

"Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

It is perfectly obvious that in the first sentence of the second paragraph of Section 56 the Congress was undertaking to establish the venue of suits under the Federal Employers' Liability Act brought in *"a District Court of the United States."* (Emphasis supplied) Nothing is said concerning the venue of an action that is brought in a state court.

The legal doctrine that the clear expression of the one excludes the other is so ancient that it comes down to us in the time-honored maxim "expressio unius est exclusio alterius."

After prescribing venue in the United States courts, Section 56 then provides, "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states." This provision is concerned with jurisdiction, not venue.

In Baltimore & Ohio Railway Co. v. Kepner, 314 U.S. 44, 62 S. Ct. 6 (1941), the petitioner, an interstate railroad, brought suit in the Court of Common Pleas of Hamilton County, Ohio, against Kepner, an injured resident employee, to enjoin his continued prosecution of a suit in the United States District Court for the Eastern District of New York under the Federal Employers' Liability Act for his personal injuries. The petitioner was doing business in the district where the damage suit was filed. The accident occurred in Butler County, Ohio, a county adjacent to that of Kepner's residence, through both of which counties petitioner's railroad ran. The United States Supreme Court held that a state could not validly exercise its equitable jurisdiction to enjoin a resident of the state from [4] prosecuting a cause of action arising under the Federal Employers' Liability Act in the federal court of another state where the Act conferred venue, since under the supremacy clause the venue section of the Act was controlling.

Under the decision in the Kepner case, a state court may not interfere with the venue of the federal court as prescribed in Sec. 56 by enjoining one of its citizens from prosecuting a cause of action arising under the Federal Employers' Liability Act in a federal court of another state in which the railroad is doing business at the time of commencing such action. This decision is irrelevant to the present inquiry except for the very pertinent language used by the Supreme Court at page 9 of 62 S. Ct., where it is said: "*Section 6* (45 U.S.C.A., Sec. 56) *establishes venue for an action in the federal courts.*" (Emphasis ours)

In Miles vs. Illinois Central R. Co., 315 U.S. 698, 62 S. Ct. 827 (1942), an interstate railroad brought an orig-

inal bill in the Chancery Court of Shelby County, Tennessee, seeking to enjoin one of the petitioners, Mrs. Miles, then the Tennessee administratrix of her husband, a resident of that state, from further prosecuting in a Missouri state court her Federal Employers' Liability Act claim against the Railroad for the death of her husband, its employee. The fatal accident occurred in Memphis, Tennessee. The court held that a Tennessee State Court could not, in view of the provision of the Act giving state and federal courts concurrent jurisdiction, enjoin a Tennessee citizen from suing on a claim in Missouri State Courts.

At page 830 of 62 S. Ct., Mr. Justice Reed, in delivering the opinion of the Court, referred to the legislative history of Section 6, and made this significant statement:

"Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent. *The venue of state court suits was left to the practice of the forum.*" (Emphasis ours)

[5] Under the decision in the Miles case a state court may not enjoin one of its resident citizens from prosecuting a cause of action arising under the Federal Employers' Liability Act in a state court of another state in which the defendant railroad is doing business at the time of commencing such action. That is all the Miles case holds. It does not hold that venue of the action in the state court where the damage suit is filed cannot be controlled by that state. It certainly does not hold that venue cannot be controlled by the state in which the damage suit is brought, and where the injury occurred and the employee resides. Indeed, the statements of the Supreme Court of the United States indicate just the contrary. Of course, there can be no interference with the jurisdictional right of the employee to bring his suit as a transitory cause of action in any state in which the defendant railroad does business and there can be no discrimination in the matter of venue between suits under the Federal Employers' Lia-

bility Act and other suits. The state laws must be impartially administered. There can be no question that the State of Texas and its courts administer and enforce Sec. 25, Article 1995, Vernon's Annotated Texas Statutes, prescribing venue in suits brought against a railroad, impartially and without discrimination between Federal Employers' Liability Act cases and other cases in which a railroad is sued, whether such cases are interstate or intrastate.

Since appellee is asserting a right under the Federal law, it is our duty fully to protect him, as the Congress intended him to be. The state law of Texas which requires a suit against a railroad to be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of his injury, and which further provides that if the defendant railroad corporation does not run or operate its railway through the county in which the plaintiff resided at the time of the injury, and has no agent in such county, then said suit shall be brought either in the county [6] in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road or has an agent, fully protects the plaintiff and does not in any way deprive him of any right given him by the federal statute.

We grant that the state cannot defeat the effective enjoyment of a federal right given a citizen by a technical or local procedural device, but this rule has no application where no legal right is either defeated or curtailed. In the instant case the railroad operates both in McLennan County and in Harris County. There can be no conceivable reason why the state should not have the right in such case to prescribe the venue governing the prosecution of such suit. It is clear that the Congress intended that the state should have such right.

Section 1404 of Title 28, U.S.C.A., provides that for the convenience of the parties and witnesses, in the inter-

est of justice, a district court may transfer any civil action to any other district or division where it might have been brought. This section does not employ the language of Sec. 56 and limit its application to *district courts of the United States.* Nevertheless, the Supreme Court of the United States has held that it applies only to suits filed in the United States courts. We point this out for it shows that even when the Federal Employers' Liability Act suit is brought in the federal court, the employee does not have an unrestricted choice of forum since his suit is subject to transfer by the court. Since we do not have the doctrine of forum non conveniens in Texas and Sec. 1404 of Title 28, U.S.C.A., does not apply to state courts, our courts may not transfer causes of action except in compliance with statutory provisions governing venue of causes of action in this State. We think it probable that had not congress understood that these cases would be governed by State Venue Statutes, Sec. 1404 would have been so written as to include suits filed in state courts.

[7] In Missouri vs. Mayfield, 340 U. S. 1, 71 S. Ct. 1, 95 L. Ed. 3 (1950), the United States Supreme Court held that the State of Missouri cannot allow suits by nonresident Missourians for liability under the Federal Employers' Liability Act arising out of conduct outside that state and discriminatorily deny access to its courts to a nonresident who is a citizen of another state. This decision is based upon not only the Employers' Liability Act but also the Constitution of the United States, Article IV, Sec. 2, which would prevent such discrimination. It also held that the state court "should be freed to decide the availability of the principle of forum non conveniens in these suits according to its own local law," where the accident occurred out of the state and neither the plaintiff nor the defendant was a resident of the state. If a state under such circumstances can refuse to entertain the action, a fortiori should it have the right to regulate by state law the venue of the action within the state where there is no discrimination against cases under the Federal Employers' Liability Act.

We quote from the opinion of Mr. Justice Frankfurter in the Mayfield case at pages 2 and 3, 71 S. Ct., as follows:

"But if a State chooses to '[prefer] residents in access to often overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers' Liability Act. Douglas v. New York, New Haven R. Co., 279 U. S. 377, 387, 49 S. Ct. 355, 356, 73 L. Ed. 747. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of 'forum non conveniens,' a question of State law not open to review here."

The local citizen is given the election to sue in the federal court or the state court. The Congress, as stated, has prescribed the venue for suits filed in the district courts of the United States. If the injured employee chooses to sue in the state court in the state where he resides and was injured, then his suit is subject to the impartial and nondiscriminatory venue statutes of the state. Surely the Congress in enacting Sec. 56 did not intend to prefer Federal Employers' Liability Act cases over all others, or to override state [8] laws by undertaking to prefer one citizen of the state over others. The state is not compelled by Sec. 56 to open its courts to Federal Employers' Liability Act suits. If it desires, it may do so, subject to its venue laws, on an impartial and nondiscriminatory basis.

In Waltz vs. Chesapeake & O. Ry. Co., 65 F. Supp. 913, the Court stated with respect to concurrent jurisdiction:

"The construction of the term 'concurrent jurisdiction' has been interpreted so far as state court jurisdiction is concerned under this act to entertain suits thereunder if 'its local laws are appropriate to the occasion.' As was stated in Second Employers' Liability Case (Mondou v. New York, N. H. & H. R. Co.), 1911, 223 U.S. 1, 56, 57, 32 S. Ct. 169, 178, 56 L. Ed. 327, 38 L. R. A., N.S., 44:

"'. . . there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure, but only a question of the duty of such a court, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress, and susceptible of adjudication according to the prevailing rules of procedure.'".

Appellee relies largely on the case of Pope vs. Atlantic Coast Line R. Co., 345 U.S. 379, 73 S. C. 749. The Supreme Court in that case held that Section 1404 (a) of the Federal Code of 1948 does not apply to actions brought in the state courts, and therefore does not change the law as enunciated in the Kepner and Miles decisions. In the Pope case the injury occurred in Ben Hill County, Georgia, which was the place of the plaintiff's employment and residence. He filed his suit in the Circuit Court of Jefferson County, Alabama. The railroad brought suit to enjoin the plaintiff from prosecuting his suit under the Federal Employers' Liability Act in the Alabama court for injuries he received in the course of his employment in Georgia. The court held that the Alabama suit could not be enjoined. We see nothing in that case or in the other cases cited by appellee that in any way are determinative of the question involved in this suit. In the present case the suit, if transferred to McLennan County, may be prosecuted in a county where the appellant railroad operates, where the appellee was injured, and where he resides.

Appellee also relies upon certain language in the Miles case, supra. We quote as follows from that case:

[9] "The Missouri court here involved must permit this litigation. To deny citizens from other states, suitors under F.E.L.A., access to its courts would, if it permitted access

to its own citizens, violate the Privileges and Immunities Clause. Constitution, Art. IV, §2; McKnett v. St. Louis & S. F. Ry. Co., 292 U.S. 230, 233, 54 S. Ct. 690, 691, 78 L. Ed. 1227. Since the existence of the cause of action and the privilege of vindicating rights under the F.E.L.A. in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right to sue in federal courts. It is no more subject to interference by state action than was the federal venue in the Kepner case.

"This is not to say that states cannot control their courts."

We think this language clearly supports our holding that venue, as distinguished from jurisdiction, is established by state enactment and is subject to state law. Note that the right given to sue is to sue in *state courts of proper venue* where their jurisdiction is adequate. Further, the implication is certain that states can control their own courts.

The cases of Arnold vs. Panhandle & S. F. Ry. Co. (1957), 353 U.S. 360, 77 S. Ct. 840, and Deen vs. Gulf, Colorado & S. F. Ry. Co., 353 U.S. 925, 77 S. Ct. 715, 1 L. Ed. 2d 721, cited by appellee, are not pertinent to the question involved in the instant case. They clearly deal with rules of law or practice directly affecting the employee's right of recovery and the employer's liability, and are in no way concerned with venue. The case of Boyd vs. Grand Trunk Western R. Co. (1949), 338 U.S. 263, 70 S. Ct. 26, 94 L. Ed. 55, also cited by appellee, merely holds that the railroad employee's agreement to bring suit only where the employee resided or where his injuries were sustained was void. In that case the railroad brought suit in the Michigan Circuit Court of Calhoun County to enjoin the injured employee from prosecuting his cause of action under the Federal Employers' Liability Act in the Superior Court of Cook County, Illinois, contrary to agreement. The case has no relevancy to the question of venue in the present case.

Appellee also relies on the case of McAllister vs. Magnolia Petrolem Company, 78 S. Ct. 1201. The question presented in that case was whether the Texas statute of limitation was applicable to a [10] claim for unseaworthiness where the seaman's action for unseaworthiness was combined with an action under the Jones Act. The Jones Act, 46 U.S.C.A., Sec. 688, incorporates the limitation period provided for under the Federal Employers' Liability Act, 45 U.S.C.A., Sec. 56. Sec. 56 establishes the limitation period of three years for the enforcement of the federal right created and the limitation period is an integral part of such right. Since if a seaman desires to sue for both unseaworthiness and Jones Act negligence, he must do so in a single proceeding, the United States Supreme Court held that the same limitation period would apply to both grounds of recovery comprising the single cause of action. The Court did not hold that the state could not apply its own statutes of limitation to admiralty rights of action for which Congress has not prescribed a limitation period. Where Federal statutes, which create rights of action, do not establish the period of limitations, both state and federal courts have applied the state statutes.

It will be noted that while Sec. 56 does prescribe the three year limitation period as an integral part of the right created, it nowhere undertakes to establish venue for cases filed in the state courts. Moreover, lessening the period during which a cause of action may be brought may impair the right created since a right of action which one has for three years is curtailed by lessening the time during which it may be effectively asserted. This is by no means true of state venue statutes in F.E.L.A. suits brought in the state where the cause of action has arisen and the plaintiff resides and the defendant railroad does business.

It follows that this case should have been transferred to McLennan County.

Reversed and remanded, with instructions to the trial court to transfer the cause to the District Court of McLennan County.

/s/ Ewing Werlein
Associate Justice

Judgment rendered and opinion filed December 18, 1958.

APPENDIX B

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1958, present SPURGEON E. BELL, Chief Justice, and Associate Justices PHIL. D. WOODRUFF and EWING WERLEIN.

In the cause

MISSOURI PACIFIC RAILROAD COMPANY, Appellant, No. 13,343

vs.

AUBREY LEE LITTLE, Appellee,

From District Court of Harris County
Tr Ct #504,247
Opinion by Werlein J.

the following judgment was rendered on December 18, 1958:

"This cause, being an appeal from an order overruling appellant's plea of privilege rendered and entered by the court below on June 10, 1958, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment; it is therefore considered, adjudged and

ordered that the judgment of the court below be reversed and the cause remanded with instructions to the court below to sustain appellant's said plea of privilege filed therein on April 16, 1958, and to transfer the venue of this cause as between the appellant, Missouri Pacific Railroad Company, and the appellee, Aubrey Lee Little, to the District Court of McLennan County. It is further ordered that the appellee, Aubrey Lee Little, pay all costs incurred by reason of this appeal and all such trial court costs as were therein incurred by reason of the said plea of privilege filed therein. It is further ordered that this decision be certified below for observance."

APPENDIX C

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the First Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1958, present SPURGEON E. BELL, Chief Justice, and Associate Justices PHIL D. WOODRUFF and EWING WERLEIN.

In the cause

MISSOURI PACIFIC RAILROAD COMPANY, Appellant, No. 13,343

vs.

AUBREY LEE LITTLE, Appellee,

From District Court of Harris County

Tr Ct #504,247

Opinion by———

the following order was entered January 8, 1959:

"It is ordered that appellee's motion for rehearing be overruled."

APPENDIX D

IN THE SUPREME COURT OF TEXAS

No. A-7188 — April 1, 1959

Aubrey Lee Little — From Harris County

vs.

Missouri Pacific Railroad Co. — First District.

This day came on to be heard application of petitioner for a writ of error to the Court of Civil Appeals for the First District, and the same having been duly considered, it is ordered that the application be, and hereby is, dismissed for want of jurisdiction; that the applicant, Aubrey Lee Little, pay all costs incurred on this application.

APPENDIX E

IN THE SUPREME COURT OF TEXAS

No. A-7188 — April 22, 1959.

Aubrey Lee Little — From Harris County

vs.

Missouri Pacific Railroad Co. — First District.

This day came on to be heard petitioner's motion for rehearing of application for writ of error, and, after due consideration, it is ordered that said motion be, and is hereby, overruled.

APPENDIX F

No. 504,247

AUBREY LEE LITTLE, Plaintiff	)	In The
-vs-	)	DISTRICT COURT
MISSOURI PACIFIC RAILROAD COMPANY, Defendant	)	Harris County, Texas 80th Judicial District

ORDER OVERRULING PLEA OF PRIVILEGE

On the 2nd day of June, A. D. 1958, same being a regular term of this Court, there came on to be heard in due course in the above entitled and numbered cause the Plea of Privilege filed by defendant, Missouri Pacific Railroad Company, together with the Controverting Affidavit thereto as filed by plaintiff; thereupon, came the plaintiff by and through his attorneys of record, and came also the defendant, Missouri Pacific Railroad Company, by its attorneys of record, and all parties announced ready for trial on said defendant's Plea of Privilege herein filed. The evidence was thereupon heard and the Court having heard arguments of counsel for plaintiff and defendant, and the Court became fully advised, the Court is of the opinion that the Plea of Privilege as filed herein by defendant, Missouri Pacific Railroad Company, should be in all things overruled. It is accordingly,

ORDERED, ADJUDGED AND DECREED by the Court that the Plea of Privilege as filed herein by Missouri Pacific Railroad Company be, and the same is hereby in all things overruled, and that the venue of this cause be

and the same is hereby fixed and retained in Harris County, Texas, the county in which said suit was originally filed.

To which action and ruling of the Court defendant, Missouri Pacific Railroad Company, in open Court duly excepted and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, sitting at Houston, Texas, which exception and notice of is noted and here and now entered of record.

SIGNED AND ENTERED this the 10th day of June, A. D. 1958.

/s/ Byron Johnson
Judge Presiding

APPENDIX G

STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority, exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929; 28 U. S. Code, Sec. 1257.

APPENDIX H

FEDERAL EMPLOYERS' LIABILITY ACT

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

APPENDIX I

ACTIONS; LIMITATIONS; CONCURRENT JURISDICTION OF COURTS

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989; 45 U. S. Code, Sec. 56.

APPENDIX J

Article 1995 of Vernon's Annotated Texas Statutes in part:

4. VENUE

Art. 1995. [1830] [1194] [1198] Venue, general rule

No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases:

Section 25: Railway personal injuries. — Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office. As amended Acts 1947, 50th Leg., p. 104, ch. 71, § 1.

Section 30. Special venue.—Whenever in any law authorizing or regulating any particular character of action, the venue is expressly prescribed, the suit shall be commenced in the county to which jurisdiction may be so expressly given.

For comparison of above statutes to other Sections of Venue Law of Texas, See:

Section 23: Corporations and Associations.—Suits against a private corporation, association, or joint stock company

may be brought in the county in which its principal office is situated; or in the county in which the cause of action or part thereof arose; or in the county in which the plaintiff resided at the time the cause of action or part thereof arose, provided such corporation, association or company has an agency or representative in such county; or, if the corporation, association, or joint stock company had no agency or representative in the county in which the plaintiff resided at the time the cause of action or part thereof arose, then suit may be brought in the county nearest that in which plaintiff resided at said time in which the corporation, association or joint stock company then had an agency or representative. *Suits against a railroad corporation, or against any assignee, trustee or receiver operating its railway, may also be brought in any county through or into which the railroad of such corporation extends or is operated. Suits against receivers of persons and corporations may also be brought as otherwise provided by law.* As amended Acts 1943, 48th Leg., p. 350, ch. 228, § 1. (Emphasis supplied)

Section 27: Foreign corporations.—Foreign corporations, private or public, joint stock companies or associations, not incorporated by the laws of this State, and doing business within this State, may be sued in any county where the cause of action or a part thereof accrued, or in any county where such company may have an agency or representative, or in the county in which the principal office of such company may be situated; or, when the defendant corporation has no agent or representative in this State, then in the county where the plaintiffs or either of them, reside.

APPENDIX K

CONSTITUTION OF UNITED STATES OF AMERICA

Article VI, Section 2:

Clause 2. Supreme Law of Land.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX L

JURISDICTION OF DISTRICT COURTS OF TEXAS CONSTITUTION OF TEXAS

Article 5, Section 8 (Vol. 2, Vernon's Texas Constitution):

Sec. 8. The District Court shall have original jurisdiction in all criminal cases of the grade of felony; in all suits in behalf of the State to recover penalties, forfeitures and escheats; of all cases of divorce; of all misdemeanors involving official misconduct; of all suits to recover damages for slander or defamation of character; of all suits for trial of title to land and for the enforcement of liens thereon; of all suits for the trial of the right of property levied upon by virtue of any writ of execution, sequestration or attachment when the property levied on shall be equal to or exceed in value five hundred dollars; *of all suits, complaints or pleas whatever, without regard to any distinction between law and equity; when*

the matter in controversy shall be valued at or amount to five hundred dollars exclusive of interest; of contested elections, and said court and the judges thereof, shall have power to issue writs of habeas corpus, mandamus, injunction and certiorari, and all writs necessary to enforce their jurisdiction. (Emphasis supplied)

The District Court shall have appellate jurisdiction and general control in probate matters, over the County Court established in each county, for appointing guardians, granting letters testamentary and of administration, probating wills, for settling the accounts of executors, administrators and guardians, and for the transaction of all business appertaining to estates; and original jurisdiction and general control over executors, administrators, guardians and minors under such regulations as may be prescribed by law. The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law; and shall have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law. As amended Aug. 11, 1891; proclamation Sept. 22, 1891.

VERNON'S ANNOTATED TEXAS STATUTES

Article 1906. 1705, 1098, 1117 Original jurisdiction

The district court shall have original jurisdiction in civil cases of:

1. Suits in behalf of the State to recover penalties, forfeitures and escheats.

2. Cases of divorce and dissolution of marriage.

3. Suits to recover damages for slander or defamation of character.

4. Suits for the trial of title to land and for the enforcement of liens thereon.

5. Suits for trial of right to property levied on by virtue of any writ of execution, sequestration or attachment, when the property levied on shall be equal to or exceed in value five hundred dollars.

6. *Suits, complaints or pleas, without regard to any distinction between law and equity, when the matter in controversary [controversy] shall be valued at or amount to five hundred dollars exclusive of interest.*

7. Contested elections. Const., Art. 5. (Emphasis supplied)